(2) *Consultation.* In the case of a banking entity that is primarily supervised by another Federal banking agency, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, the Board will consult with such agency prior to imposing conditions on the approval of a request by the banking entity for an extension under paragraph (a)(3) or (b)(1) of this section.

§ 225.182 Conformance period for nonbank financial companies supervised by the board engaged in proprietary trading or private fund activities.

(a) *Divestiture requirement.* A nonbank financial company supervised by the Board shall come into compliance with all applicable requirements of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart, including any capital requirements or quantitative limitations adopted thereunder and applicable to the company, not later than 2 years after the date the company becomes a nonbank financial company supervised by the Board.

(b) *Extensions.* The Board may, by rule or order, extend the two-year period under paragraph (a) of this section by not more than three one-year periods, if, in the judgment of the Board, each such one-year extension is consistent with the purposes of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart and would not be detrimental to the public interest.

(c) *Approval required to hold interests in excess of time limit.* A nonbank financial company supervised by the Board that seeks the Board's approval for an extension of the conformance period under paragraph (b) of this section must—

(1) Submit a request in writing to the Board at least 90 days prior to the expiration of the applicable time period;

(2) Provide the reasons why the nonbank financial company supervised by the Board believes the extension should be granted; and

(3) Provide a detailed explanation of the company's plan for conforming the activity or investment(s) to any applicable requirements established under section 13(a)(2) or (f)(4) of the Bank Holding Company Act (12 U.S.C. 1851(a)(2) and (f)(4)).

(d) *Factors governing Board determinations.* In reviewing any application for an extension under paragraph (b) of this section, the Board may consider all the facts and circumstances related to the nonbank financial company and the request including, to the extent determined relevant by the Board, the factors described in § 225.181(d)(1).

(e) *Authority to impose restrictions on activities or investments during any extension period.* The Board may impose conditions on any extension approved under paragraph (b) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the nonbank financial company or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the Bank Holding Company Act (12 U.S.C. 1851) and this subpart.

By order of the Board of Governors of the Federal Reserve System, November 16, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–29277 Filed 11–24–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1278

RIN 2590–AA37

Voluntary Mergers of Federal Home Loan Banks

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: Section 1209 of the Housing and Economic Recovery Act of 2008 (HERA) amended section 26 of the Federal Home Loan Bank Act (Bank Act) to permit any Federal Home Loan Bank (Bank) to merge with another Bank with the approval of its board of directors, its members, and the Director of the Federal Housing Finance Agency (FHFA). This proposed rule would establish the conditions and procedures for the consideration and approval of voluntary Bank mergers.

DATES: Written comments must be received on or before January 25, 2011.

ADDRESSES: You may submit your comments, identified by regulatory information number (RIN) 2590–AA37, by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel may be sent by e-mail to *RegComments@fhfa.gov.* Please include "RIN 2590–AA37" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Please include "RIN 2590–AA37" in the subject line of the message.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA37, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA37, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: John P. Foley, Senior Financial Analyst, Policy and Program Development, *john.foley@fhfa.gov,* (202) 408–2828 (this is not a toll-free number), Federal Housing Finance Agency, 1625 Eye Street, NW., Washington, DC 20006; Eric M. Raudenbush, Assistant General Counsel, *eric.raudenbush@fhfa.gov,* (202) 414–6421 (this is not a toll-free number); Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing the final rule. Copies of all comments will be posted without change, including any personal information you provide, such as your name and address, on the FHFA Internet Web site at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m. at the Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414–6924.

II. Background

A. The Federal Home Loan Bank System

The twelve regional Banks are instrumentalities of the United States

organized under the Bank Act.[1] The Banks are cooperatives; only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by a Bank.[2] Each Bank is managed by its own board of directors and serves the public interest by enhancing the availability of residential mortgage and community lending credit through its member institutions.[3] Any eligible institution (generally a federally insured depository institution or state-regulated insurance company) may become a member of a Bank if it satisfies certain criteria and purchases a specified amount of the Bank's capital stock.[4]

B. HERA Provisions Addressing Voluntary Mergers

Section 1209 of HERA added new paragraphs (b)(1) and (b)(2) to section 26 of the Bank Act to address voluntary mergers of Banks. Section 26(b)(1) authorizes any Bank to merge voluntarily with another Bank with the approval of the Director of FHFA and the boards of directors of the Banks involved in the merger. Section 26(b)(2) requires FHFA to promulgate regulations establishing the conditions and procedures for the consideration and approval of voluntary mergers, including approval by Bank members.[5] The HERA amendments do not provide any further details about the terms on which Banks may merge or on which FHFA may approve such mergers.

As required by section 26(b)(2), the proposed rule would establish the conditions and procedures for the consideration and approval of voluntary mergers of Banks. The proposed rule does not relate to liquidations, reorganizations, conservatorships, or receiverships undertaken by the Director of FHFA pursuant to the authority set forth at section 26(a) of the Bank Act and section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act).[6]

C. Considerations of Differences Between the Banks and the Enterprises

Section 1313 of the Safety and Soundness Act, as amended by HERA, requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the following differences between the Banks and the other Housing Enterprises (Fannie Mae and Freddie Mac): Cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability.[7] The Director also may consider any other differences that are deemed appropriate. In preparing this proposed rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors. FHFA requests comments from the public about whether differences related to these factors should result in any revisions to the proposal.

III. The Proposed Rule

The proposed rule would add a new part 1278 to the regulations of FHFA to govern voluntary mergers of Banks. It would establish required procedures for Banks to follow in order to consummate a merger, including authorization by the merging Banks' boards of directors, ratification by the Banks' member institutions, and approval by the Director of FHFA. In developing the proposed rule, FHFA looked to governance practices that are common under general principles of corporate law, disclosure practices that are required under the federal securities laws, and the approval standards required under federal banking laws relating to mergers of insured depository institutions as guidance for the key provisions of this proposal. The substance of each provision of the proposed rule is described in the following paragraphs.

Section 1278.1—Definitions:

Proposed § 1278.1 sets forth definitions of terms used in proposed part 1278. As is discussed more thoroughly below, the terms "merge" and "merger" would be defined broadly to encompass not only a merger in legal form—that is, a combination of two or more Banks in which one Bank continues its corporate existence and the other Bank ceases to exist as a separate legal entity by operation of law—but also all other types of business combinations that could conceivably occur between or among Banks. The proposed definition expressly includes three common forms of business combination: A merger; a consolidation, where two or more Banks combine to form one or more entirely new Banks; and a purchase and assumption (P&A) transaction, in which one or more Banks acquire substantially all of the assets and assume substantially all of the liabilities of another Bank or Banks. The definition also would include a general provision to include any other type of business combination of two or more Banks into one or more resulting Banks.

The term "Constituent Bank" would be defined to refer to any existing Bank that is a party to a proposed merger—in other words, to any Bank as it exists prior to the consummation of the merger. The term "Continuing Bank" would refer to any Bank that exists as a result of a consummated merger, regardless of whether the Bank existed prior to the merger or is an entirely new Bank created as part of the merger. In order that the provisions of this part encompass the possibility of mergers resulting in more than one Continuing Bank, such as a P&A transaction in which two Banks each acquire a portion of the assets and liabilities of another Bank, the term would be defined to include its plural form even when used in the singular.

The term "Disclosure Statement" would refer to a written document that contains all of the items that must be included in a Form S–4 Registration Statement (Form S–4) under the Securities Act of 1933 (1933Act) (or any successor form promulgated by the United States Securities and Exchange Commission (SEC) governing disclosure required for securities issued in business combination transactions) when prepared as a prospectus as directed in Part I of the Form S–4.[8] As discussed in detail below, the proposed rule requires each Constituent Bank to provide such a Disclosure Statement to its members in connection with the required vote to ratify a merger agreement between Banks.

The term "Effective Date" would refer to the date on which a particular merger of Banks takes effect. Where more than two Constituent Banks propose to consummate a merger in multiple stages, the term "Effective Date" would refer to the date on which each of the component transactions takes effect.

Finally, proposed § 1278.1 would also include definitions for the short forms "Bank," "Bank Act," "Director," "FHFA," and "SEC."

Section 1278.2—Authority:

Proposed § 1278.2 provides that any two or more Banks may merge provided that the requirements of this part, as outlined in paragraphs (a) through (e), are met. As noted above, § 1278.1 would define "merge" broadly to include traditional mergers, consolidations, P&A transactions, and any other form of business combination in which two or

[1] *See* 12 U.S.C. 1423, 1432(a).

[2] *See* 12 U.S.C. 1426(a)(4), 1430(a), 1430b.

[3] *See* 12 U.S.C. 1427.

[4] *See* 12 U.S.C. 1424; 12 CFR part 1263.

[5] *See* 12 U.S.C. 1446(b)(1), (2).

[6] *See* 12 U.S.C. 1446(a), 4617.

[7] *See* 12 U.S.C. 4513.

[8] *See* 17 CFR 239.25.

more Banks could engage. The purpose of this broad definition would be to subject all contemplated business combinations between Banks to the approval process that would be established by this part. The breadth of the definition does not imply that FHFA would necessarily approve all types of mergers, but only that regulations contained in this part would not preclude proposed business combinations that involve something other than a legal merger. As provided in the remaining portions of this part, FHFA would consider the merits of each proposed transaction, regardless of its structure, on a case-by-case basis in deciding whether to approve the transaction.

Although the term "merger" technically refers to a transaction in which one business entity absorbs another entity, with the former continuing to exist after the consummation of the transaction, the term is also used in a broader sense to refer to any type of business combination, especially those between entities of comparable size.[9] The express authorization of "voluntary" mergers in section 26(b) of the Bank Act evidences a Congressional intent to permit the Banks to consider business combinations that could be of benefit to their members and to the Bank System as a whole. FHFA recognizes that, given the unique characteristics of the Banks as largely tax-exempt federally chartered cooperatives with limited powers, it is possible that the Banks will not have the same motivation as depository institutions or other business corporations to engage in business combinations other than legal mergers. For example, while P&A transactions are often undertaken as a vehicle to achieve particular tax effects, or to avoid transferring some assets or liabilities, these considerations may not be applicable in Bank mergers. In any case, it is possible that Banks may determine that other business combination structures may have legal or business advantages over a legal merger structure in particular circumstances.

Accordingly, FHFA believes that it is justified in interpreting the statutory merger authorization broadly, especially given that, under the terms of the statute and the proposed rule, no business combination may be consummated without the approval of the Director. FHFA therefore requests comment on whether the final rule should set forth a broad or narrow definition for the terms "merge" and "merger," and in particular on reasons for using types of business transactions other than legal mergers for the purpose of achieving combinations of Banks.[10]

Paragraphs (a) through (e) of proposed § 1278.2 summarize the requirements of regulations in this part to which the broad authorization is subject: The Constituent Banks must agree upon the terms of the proposed merger, and the board of directors of each must authorize a written merger agreement; the Constituent Banks must jointly file a merger application with FHFA; the Director of FHFA must grant preliminary approval of the merger; the members of each Constituent Bank must vote to ratify the merger agreement; and the Director must grant final approval of the merger. The details of each of these requirements are set out in §§ 1278.3 through 1278.7 of the proposed rule, respectively, as noted in each of the paragraphs of proposed § 1278.2. In order to clarify the different stages of the process, the proposed rule refers to "authorization" of a merger agreement by the boards of directors of the Constituent Banks, "approval" of the merger by the Director of FHFA and "ratification" of the merger by the members of the Constituent Banks.

Section 1278.3—Merger Agreement:

Section 1278.3 of the proposed rule addresses the terms of the merger agreement that the Constituent Banks to any transaction must execute. It would provide that a merger of Banks under the authority of § 1278.2 shall require a written merger agreement that meets the requirements of paragraphs (a) and (b) of § 1278.3.

Paragraph (a) of § 1278.3 would require that any merger agreement be authorized by the affirmative vote of a simple majority of the board of directors of each Constituent Bank at a meeting on the record and executed by authorized signing officers of each Constituent Bank. Under this provision, a Bank's board of directors would be deemed to have authorized the execution of a merger agreement if a majority of directors present at the meeting, at which a quorum was present, voted in favor of the authorization. The proposed rule would require that the board meet on the record, meaning that the votes and matters discussed must be fully and accurately reflected in an electronic recording, a written transcript, or written minutes of the meeting.

Section 26(b)(1) of the Bank Act requires that the board of directors of each merging Bank approve the merger transaction, but does not address the details of the boards' approval, such as the percentage of votes required or the method of voting. Given the absence of any statutory requirements regarding the details of the board approval, as well as the mandate to establish the conditions and procedures for a merger, FHFA has broad authority to establish an appropriate model for board approval of mergers, including models that might differ from that reflected in the proposed rule.

FHFA has considered several alternatives in developing the proposed rule, and has opted to use the traditional corporate approach for board approval. This approach corresponds with the manner in which board decisions currently are made under the by-laws of all of the Banks. To the extent that a higher standard of deliberation may be desirable for a decision as significant as a merger, FHFA believes that the required ratification by each Banks' members, the required approval of the Director of FHFA, and the other detailed requirements of the proposed rule (all discussed below) provide for sufficient deliberation by the various constituencies. In addition, nothing in the text or legislative history of section 26(b) of the Bank Act evidences any Congressional intent to establish a standard for board approval that is different from that traditionally used by the Banks, or by corporations generally. To the contrary, the addition of the Banks' voluntary merger authority to the Bank Act appears intended to enable and encourage the Banks to develop merger proposals based on their own assessments of their business needs. To require authorization by something more than a simple majority of each board could discourage Bank management and directors from developing and considering merger proposals that could be of benefit to the Bank's members and to the Bank System as a whole. Nevertheless, FHFA requests comment upon whether the standard for approval by the Constituent Banks' boards of directors should differ from that set forth in the proposed rule and, if so, which standard should be made to apply.

Proposed § 1278.3(b) generally would require that a merger agreement set forth all material terms and conditions of the proposed merger and also that it include provisions addressing certain enumerated issues. The enumeration is not intended as a safe harbor regarding whether a merger agreement sets forth all material terms and conditions of the

[9] *See* 19 Am.Jur 2d *Corporations* § 2169 (2010); *Barron's Finance and Investment Handbook* 343 (2d ed. 1987).

[10] As used hereinafter in this preamble, unless otherwise specified, the terms "merge" and "merger" shall encompass all types of business combination transactions.

merger, but is merely a list of issues that must be addressed in all cases.

Thus, paragraph (b)(1) would require the Banks to include in an agreement the proposed Effective Date of the merger, which should be established with sufficient regard for amount of time that it will take to fulfill the requirements of the regulations in this part. FHFA does not intend that an agreement must specify in advance a particular date on which the merger will occur, but does expect that an agreement will include provisions from which the effective date can be reasonably determined, such as within a specified period after the occurrence of a particular event, such as the receipt of final FHFA approval or the satisfaction of all required conditions. In cases where more than two Constituent Banks are a party to a merger agreement that governs two or more component combinations to be consummated at different times, the Banks would be required to include in the agreement the Effective Dates for each component combination.

Paragraph (b)(2) would require the Banks to include in an agreement a description of the main features of the proposed organization certificate and the proposed by-laws for the Continuing Bank. In the case of the proposed organization certificate, the main feature to be addressed would be the listing of states that will make up the district of the Continuing Bank. FHFA recognizes the possibility that certain mergers could involve, as an incident to the initial transaction, the subsequent transfer of states located within the district of one or more of the initial Constituent Banks to the districts of other Banks that are not parties to the initial merger transaction. In such cases the agreement should describe the proposed organization certificate as it would exist immediately after the initial transaction, as well as after any subsequent transactions. Even if those subsequent transactions are not governed by the same merger agreement, they must be described in the merger application filed with FHFA.

Paragraph (b)(3) would require the Banks to include in an agreement a description of the main features of the proposed capital structure plan for the Continuing Bank. Under section 6 of the Bank Act, as implemented by the regulations of the Finance Board, each Bank is required to develop and operate under a capital structure plan that governs the issuance and redemption of, and the rights attached to, the capital stock held by the Bank's members.[11] By statute, all new capital structure plans and modifications to any existing capital structure plan must be approved by FHFA.[12] Consequently, review and approval of the proposed capital structure plan of the Continuing Bank will be a major component of the overall merger approval process. FHFA believes that it is important that the Constituent Banks address the capital structure of the Continuing Bank early in the process and that this should not be left for negotiation after the execution of a merger agreement. Thus, a merger agreement should set forth the main features of the contemplated capital structure plan, including the par value and transferability of the Continuing Bank's capital stock; minimum stock purchase requirements, including both membership and activity-based stock purchase requirements; the various classes of stock and the rights attached to each; and the redemption and repurchase of shares, both from a member and upon termination of or withdrawal from membership.

Paragraph (b)(4) would require the Banks to address in a merger agreement the proposed size and structure of the Continuing Bank's board of directors. New part 1278 refers to the "proposed" board size and structure in recognition of the fact that section 7 of the Bank Act generally requires the Director of FHFA to establish the size and structure of the board of directors of each Bank and gives the Director additional discretion to adjust the board size in connection with any Bank merger.[13] FHFA believes that the Constituent Banks should address this issue at an early stage in the merger process even though the ultimate responsibility for determining the size and composition of the board of the Continuing Bank lies with the Director, acting within the confines of the Bank Act. FHFA requests comments on how best to address the transition from the separate boards of the Constituent Banks to the combined board of the Continuing Bank, and the manner in which it should establish the size and composition of the board for the Continuing Bank, such as immediately on the Effective Date of the merger or gradually through the annual designation of directorships process in the years subsequent to the merger. FHFA also requests comment on how effective corporate governance of a Continuing Bank could be best achieved, whether through increased reliance on board committees or otherwise, if the requirements of section 7 of the Bank Act were to mandate a board size that is significantly larger than those that currently exist.[14]

Paragraphs (b)(5) through (b)(8) of proposed § 1278.3 would require, respectively, that a merger agreement: Set forth the formula to be used to exchange the stock of one or more Constituent Banks for that of the Continuing Bank and prohibit the issuance of fractional shares of Bank stock; set forth any conditions that must be satisfied prior to the Effective Date of the proposed merger; set forth any representations or warranties made by any of the Constituent Banks or their officers, directors or employees; and describe any legal opinions or rulings, whether generated internally, by outside counsel, by FHFA, or another government agency, in connection with the proposed merger. The prohibition on the issuance of fractional shares is consistent with the capital plans of the majority of the Banks, some of which already prohibit fractional shares explicitly, and others of which do so implicitly, either by requiring all stock purchase requirements to be rounded up to the nearest whole number of shares or by requiring that all stock be issued only at its stated par value. The prohibition would not conflict with any Bank's capital plan, as no capital plan expressly authorizes the issuance of fractional shares. The conditions that would be required to be enumerated under paragraph (b)(6) would include, in all cases, ratification of the merger by the members of the Constituent Banks and approval of the merger by the Director of FHFA.

Finally, paragraph (b)(9) would require that a merger agreement contain a provision permitting the board of directors of any Constituent Bank, with the concurrence of the Director of FHFA, to terminate the agreement after the members of the Banks have voted to ratify the agreement in cases where: Information disclosed to members contained material errors or omissions; material misrepresentations were made to members regarding the impact of the proposal; fraudulent activities were used to obtain the members' ratification of the merger; or an event occurred between the time of the member vote and the Effective Date of the merger that would have a significant adverse impact

[11] *See* 12 U.S.C. 1426; 12 CFR part 933. Currently, all but one of the Banks operate under a capital structure plan approved by FHFA pursuant to section 6 of the Bank Act.

[12] *See* 12 U.S.C. 1426(b).

[13] *See* 12 U.S.C. 1427.

[14] All Banks currently have between 14 and 18 directors, with the majority having between 15 and 17 directors.

on the future viability of the Continuing Bank.

Section 1278.4—merger application:

Section 1278.4 of the proposed rule would govern the application that the Constituent Banks must file jointly with FHFA to obtain approval for any proposed merger. Although Part 1278 would require an application to include certain specified items, FHFA expects that, even prior to filing a formal application with FHFA, the Constituent Banks will have discussed the possibility of a merger with agency staff on an informal basis to determine whether a merger would present any significant supervisory concerns or involve novel aspects that might require the submission of other categories of information for the Director to appropriately assess the merits of the proposed merger.

Proposed § 1278.4(a) would enumerate the minimum required contents of a merger application. Paragraph (a)(1) would address the written statement that the Constituent Banks would be required to file as the main part of the application. Part 1278 would require that this statement contain: a summary of the material features of the proposed merger; the reasons for the proposed merger; the effect of the proposed merger on the Constituent Banks and their members; the planned Effective Date of the merger; A summary of the material features of any related transactions and the bearing that the consummation of, or failure to consummate, the related transactions is expected to have upon the merger; the names of the persons proposed to serve as directors and senior executive officers of the Continuing Bank; a description of all proposed material operational changes; information demonstrating that the Continuing Bank will comply with all applicable capital requirements after the Effective Date; a statement explaining all officer and director indemnification provisions; and an undertaking that the Constituent Banks will continue to disclose all material information, and update all items, as appropriate. In demonstrating future compliance with applicable capital requirements, the Banks should correlate the data in the pro forma financial statements of the Continuing Bank to the capital calculations required under part 932 of the regulations of the Finance Board.[15]

Paragraph (a)(2) would require an application to include a copy of an executed merger agreement, accompanied by a certified copy of the resolution of the board of directors of each Constituent Bank authorizing the execution of the merger agreement. In addition, paragraphs (a)(3) through (a)(5) would require the Banks to provide, respectively, copies of the proposed organization certificate, the proposed by-laws, and the proposed capital structure plan of the Continuing Bank. Each of those items should have been approved by the board of directors of each of the Constituent Banks prior to submission to FHFA, which will evaluate them and include any necessary approvals as part of the approval of the merger transaction.

Paragraphs (a)(6) and (a)(7) would require the Banks to include as part of the application the most recent audited financial statements for each Bank and pro forma financial statements for the Continuing Bank in such forms as would be required to be included in the Disclosure Statement that the Banks must provide to their members in connection with the member vote under proposed § 1278.6 (discussed in detail below). Depending upon the option chosen by the Constituent Banks, the pro forma financial statements appearing in the Disclosure Statement could include forecasted results for up to twelve (12) months following the date of the most recent balance sheet included in the Disclosure Statement. FHFA is considering whether it should require the Constituent Banks to provide as part of the merger application pro forma forecasted results for as many as three years following the date of the most recent balance sheet in order to better assess the long-term prospects of the Continuing Bank. FHFA requests comment on whether it is advisable to include a different pro forma timeframe for the merger application than that which must be followed in the Disclosure Statement and whether a three-year forecast is appropriate.

Paragraph (b) of proposed § 1278.4 provides that FHFA may require the Constituent Banks to submit any additional information that it determines is required to assess a particular merger. This information may be requested at any time, even after a merger application has been deemed complete under paragraph (c). If FHFA has determined that an application is complete, any subsequent requests for additional information must relate to matters that are derived from or prompted by the information previously submitted, or matters of a material nature that were not reasonably available previously, such as in the case of developments occurring after the determination of completeness or in the case of materials concealed by one of the Banks. Under the proposed rule, FHFA may use a Constituent Bank's failure to provide the required information in a timely manner as grounds to deny a merger application.

Paragraph (c) would govern the timing for determining whether a merger application is complete. Under this provision, FHFA would have thirty (30) days after the receipt of a merger application to determine whether it is complete or whether FHFA needs any additional information for the Director to evaluate the proposed merger. This part would require FHFA to inform the Constituent Banks in writing if the agency determines that an application is complete and that it has all information necessary to evaluate the proposed merger. This part also requires FHFA to inform the Constituent Banks in writing if it determines that an application is incomplete, or that it requires additional information in order to evaluate the application. In that case, FHFA would specify the number of days within which the Constituent Banks must provide any additional information or materials, giving due regard to the nature and extent of the information or materials requested. Part 1278 would require that, within fifteen (15) days of receipt of the additional information or materials, FHFA again determine whether a merger application is complete and so inform the Banks.

Section 1278.5—Preliminary Approval by Director:

With respect to the approval that the Constituent Banks must obtain from the Director of FHFA before a merger may be consummated, the proposed rule contemplates a two-stage process. The first stage would encompass a review of all substantive aspects of a proposed merger, followed by either a preliminary approval or a denial of the merger application. If the Director grants preliminary approval, the second stage would be an abbreviated review after the members of each Constituent Bank have ratified the merger, followed by a final decision. Section 1278.5 of the proposed rule addresses the first stage of the process and includes the standards that the Director would apply in deciding whether to grant or deny preliminary approval and the process for notifying the Constituent Banks of the decision. The proposed rule anticipates that after the Director has granted preliminary approval of a merger, the Constituent Banks will present the terms of the approved merger to their members for ratification. Thus, at the time that the matter is presented to the members they will know that FHFA has granted preliminary approval of the transaction and the nature of any conditions that

[15] 12 CFR part 932.

FHFA has imposed in connection with the preliminary approval. As provided in proposed § 1278.7(b)(2), which is discussed in more detail below, at the second stage the scope of the Director's review would be limited to considering whether: The member vote was carried out in accordance with § 1278.6; all conditions of the preliminary approval have been met; and no material adverse events have occurred.

The standards set forth in the proposed rule which the Director would apply in determining whether to approve a merger of Banks are similar to those used by the federal depository institution regulators in considering mergers and acquisitions of federally insured depository institutions.[16] Proposed § 1278.5(a) provides that the Director must take into consideration the financial and managerial resources of each of the Constituent Banks, the future prospects of the Continuing Bank, and the effect of the proposed merger on the safety and soundness of the Continuing Bank and the Bank System. Each of these would be assessed based upon the materials and information provided as part of the merger application and in response to any subsequent requests for information. In order for the Director to approve a merger, the information and materials submitted must demonstrate that the financial condition of the Continuing Bank will be sound, the management and governance structure of the Continuing Bank will be capable of integrating the operations of the Constituent Banks in a safe and sound manner, that the Continuing Bank will be adequately capitalized subsequent to the merger and that the combination of the Constituent Banks will not present any undue risks to the other Banks. FHFA believes that the "financial and managerial resources and future prospects" standard applied under the federal banking statutes is well understood and provides a body of law and practice that can inform the assessment of potential mergers among Banks.

Proposed § 1278.5(b) addresses procedural aspects of the merger application process and provides that, after FHFA determines that a merger application is complete, the Director shall have thirty (30) days to consider the information and materials provided in the application and either grant or deny preliminary approval of the merger. Certain merger proposals may present novel policy issues, complex financial or accounting analyses, or unprecedented legal issues, any of which may require extended periods of time to resolve. In such cases, the Banks should consult with FHFA about those matters in advance to assure that they may receive an approval within the defined time.

Under paragraph (b)(1), if the Director decides to grant preliminary approval of the merger transaction, FHFA would provide written notice of the approval to each Constituent Bank, as well as to each other Bank and the Office of Finance. The notice provided would include any conditions that FHFA requires to be met prior to the final approval of the merger. In all cases, one of these conditions would be the ratification of the merger by the affirmative vote of the members of each Constituent Bank. The notice provided to the other Banks and to the Office of Finance under this provision would be solely for informational purposes. FHFA believes that the possibility of a merger would be a material development about which the other Banks, which are jointly and severally liable with the Constituent Banks on the System's consolidated obligations,[17] and the Office of Finance, which prepares the combined financial statements for the Bank System, should be informed. The Bank Act does not, and the proposed rule would not, give Banks that are not parties to a merger, or their members, any rights with respect to a contemplated merger, and the inclusion of the notice provision in the proposed rule should not be construed as granting any such right.

Under paragraph (b)(2), if the Director decides to deny preliminary approval of the merger, FHFA would provide similar written notice of the denial to each Constituent Bank, as well as to each other Bank and the Office of Finance. FHFA would include in the written notice to the Constituent Banks a statement of the reasons for the denial. These reasons would be tied to the standards that the Director would be required to apply under proposed § 1278.5(a), or to a Bank's failure to provide information required under this rule. The proposed rule contains no specific provision for reconsideration of a denial of preliminary approval, although nothing therein would prohibit the Constituent Banks from agreeing to an amended merger agreement and re-submitting an application for approval.

Section 1278.6—Ratification by Bank Members:

Section 1278.6 of the proposed rule would set forth the requirements for the ratification of a merger agreement by the Constituent Banks' member institutions. Section 26(b) of the Bank Act explicitly authorizes Banks to merge, provided they obtain the approval of their respective boards of directors and the Director of FHFA, and separately directs FHFA to promulgate regulations to establish the conditions and procedures for consideration and approval of voluntary mergers, which regulations are to include procedures for member approval.[18] Thus, the Bank Act does not make the exercise of the voluntary merger authority explicitly contingent on obtaining the approval of the members, but appears to leave to FHFA the authority to determine whether member approval is required and, if so, to determine the procedures for obtaining member approval. Although the concept of requiring shareholder approval for significant corporate transactions is a well-established principle of general corporate law, the governance structure of the Banks differs in certain key aspects from that of a publicly traded business corporation. For example, each Bank is a cooperative that is owned by its members, which elect their own representatives to the board on a state-wide basis, as well as a minority of independent directors, who are elected from the district at large.[19] Given that the members of a Bank have a more direct representation on the board of directors than do the shareholders of a typical business corporation, FHFA could deem the members' interests to be adequately represented by the individual board members. Notwithstanding that possibility, FHFA believes that the statutory directive to promulgate regulations governing member approval also implies that members would have a direct role in approving a merger, and for that reason has included such a member approval provision in the proposed rule.

Other than requiring FHFA to promulgate regulations addressing the matter of member approval, the Bank Act is silent on what form the Bank member approval process should take. For this reason, FHFA has modeled the proposed voting process for member ratification of a merger after the statutory requirements for member

[16] *See* 12 U.S.C. 1467a(e)(2) (acquisitions of savings associations); 12 U.S.C. 1817(j)(7)(C),(D) (bank change in control); 12 U.S.C. 1828(c)(5) (bank mergers).

[17] The Banks fund their operations principally through the issuance of consolidated obligations, which are debt instruments issued on behalf of the Banks by the Office of Finance, a joint office of the Banks, and under which the Banks are jointly and severally liable for the timely payment of principal and interest when due. *See* 12 CFR 966.2(b), 966.9(a).

[18] *See* 12 U.S.C. 1446(b)(2).

[19] *See* 12 U.S.C. 1427.

voting on the election of Bank directors, which is the only member voting scheme addressed by the Bank Act. Because the statute is silent on the requirements for member approval of mergers, FHFA could mandate voting procedures other than those set forth in the proposed rule. Although FHFA believes that the proposed voting process recognizes the cooperative nature of the Banks' corporate structure and is otherwise sound, FHFA requests comment on what other voting schemes may be appropriate for obtaining member approval of a proposed merger transaction, how those may best be structured, and the rationale for adopting them.

Proposed § 1278.6(a) would govern the member ratification voting process. The introductory portion of paragraph (a) would establish the general requirement that no merger may be consummated unless and until the merger agreement has been ratified by the affirmative vote of the members of each Constituent Bank, carried out in accordance with the requirements of paragraphs (a)(1) through (a)(4).

Paragraph (a)(1) would govern the notice requirements pertaining to the member vote on ratification of the merger. To initiate the voting process, paragraph (a)(1) would require each Constituent Bank to deliver to each of its members a ballot permitting the member to vote for or against the merger, or to abstain. It would require each Bank to deliver with the ballot a Disclosure Statement containing all of the items that would be included in a Form S–4 if the Bank were required under the federal securities laws and SEC regulations to deliver a Form S–4 proxy statement/prospectus to its members in connection with the proposed merger. Because the shares of capital stock issued by each Bank are exempted securities under the 1933 Act, a Bank would not be required to file a Form S–4 registration statement with the SEC, or to deliver a Form S–4 proxy statement/prospectus to its shareholders in connection with a merger, even if the Bank issues stock or holds a shareholder vote as part of the process.[20] Nevertheless, FHFA believes that Bank members should be as fully informed about the details of any proposed merger and the manner in which it would affect their rights and interests as any shareholder of a publicly held corporation. FHFA believes that it is appropriate to model the Disclosure Statement upon the Form S–4 proxy statement/prospectus both because all of the Banks already comply with the periodic reporting regime required under the Securities Exchange Act of 1934 (1934 Act)[21] and because the Form S–4 provides a model for comprehensive shareholder disclosure in a merger transaction that is widely accepted in the business community.

By referencing Part I of the Form S–4 (entitled "Information Required in the Prospectus") the proposed rule would require that the Disclosure Statement include information about: The transaction, including the terms of the transaction, associated risk factors and pro forma financial information; the Constituent Banks, including financial statements and discussion of the Banks' business, which may be supplied in large part through incorporation by reference of the Banks' recent periodic reports filed under the 1934 Act; the voting process; and the proposed management of the Continuing Bank. It is contemplated that, in most cases, the Constituent Banks to a particular transaction would be able to use substantially similar Disclosure Statements and, therefore, that the Banks could prepare the document jointly, with each Bank making any modifications necessary to customize the presentation to its own members. FHFA requests comment on whether a disclosure regime based on the model of the Form S–4 is an appropriate means of ensuring that the members are fully informed about the nature of the proposed merger, or whether some other standard for determining the scope and content of the disclosures would be appropriate.

Paragraph (a)(2) of proposed § 1278.6 would govern the calculation of the number of votes that each member of a Constituent Bank may cast in voting to ratify a merger agreement. The proposed rule provides that each member of each Constituent Bank shall be entitled to cast the same number of votes that the member may cast in that year's election of Bank directors, as set forth in the Bank Act and the implementing regulations.[22] As is required in the case of voting for directors, this part would require each member to cast all of its votes either for or against the ratification of the merger agreement or to abstain with respect to all of its votes.[23] Paragraph (a)(2) would require that each member's vote be made by resolution of its governing body, either authorizing the specific vote or delegating to an individual the authority to vote, as is required in the voting for directors.[24]

By statute, in the election of Bank directors, a member is entitled to cast one vote for each share of Bank stock the member was required to hold as of the record date (December 31 of the previous year), subject to a cap which is equal to the average number of shares of Bank stock required to be held by all members located in the same state. The effect of these provisions is that not all Bank stock carries the right to vote for directors. For example, a Bank member is not entitled to vote stock owned in excess of its minimum stock purchase requirement because it is not "required to be held" by the member under the statute. Similarly, stock held by a member in excess of the statutory cap, *i.e.,* the average required stock holdings for members within its state, is not entitled to be voted in the election of directors. The latter provision reflects a determination by Congress that in a cooperative system a small number of large stockholders should not be able to control the board of directors of a Bank. Lastly, an institution that owns Bank stock, but that is not a member of the Bank, such as an institution that acquired its stock in connection with the acquisition of a Bank member, is not entitled to vote its stock in an election for directors because it is not a member of the cooperative.

FHFA has decided to employ this approach for the proposed rule because it is the only member voting method enshrined in the Bank Act and, therefore, is the only manifestation of general Congressional intent on the subject. In addition, FHFA believes that whatever voting approach is used for

[20] *See* 12 U.S.C. 1426a(c)(1)(A) (Bank Act provision stating that shares of Bank capital stock are exempted securities under the 1933 Act); 15 U.S.C. 77c(a)(2) (1933 Act provision stating that provisions of 1933 Act do not apply to exempted securities, except as otherwise provided therein); 15 U.S.C. 77e (1933 Act provision requiring filing of registration statement and delivery of prospectus in interstate sale of securities, which does not apply to exempted securities).

[21] The Finance Board adopted regulations in 2004 requiring each Bank to register a class of its capital stock (which is issued only to its members) with the SEC under section 12(g) of the 1934 Act, 15 U.S.C. 781(g). *See* 12 CFR part 998; 69 FR 38811 (June 29, 2004). Each Bank subsequently registered a class of its stock with the SEC in compliance with that regulation. Separately, HERA included a provision requiring the Banks to register their stock under section 12(g) of the 1934 Act, and to maintain that registration. *See* 15 U.S.C. 78oo(b). As a result, the Banks are subject to the periodic reporting requirements of section 13(a) of the 1934 Act and must file with the SEC annual reports on Form 10–K, quarterly reports on Form 10–Q, and current reports on Form 8–K. However, the Banks and their securities are exempted from most other requirements of the federal securities laws, based both on specific no-action relief from the SEC obtained at the time the Banks first registered their stock and subsequent amendments made by HERA to the Bank Act which exempts the Banks from many requirements of the federal securities laws. *See* 12 U.S.C. 1426a.

[22] *See* 12 U.S.C. 1427(b)(1); 12 CFR 1261.6.

[23] *See* 12 CFR 1261.8(d).

[24] *See id.*

approving Bank mergers must be consistent with the cooperative model established by Congress, and thus should not allow for the possibility that a few large stockholders, some of which may not even be members of the cooperative, may control the outcome of a vote on a merger. FHFA requests comment on whether there are alternative voting schemes that may be appropriate in the context of a merger vote, including the legal basis for any alternative and the manner in which such an alternative would reflect the cooperative nature of the Bank System.

Paragraph (a)(3) of proposed § 1278.6 would provide that no Bank may review any ballot until after the closing date established in the Disclosure Statement and may not include in the tabulation any ballot received after the closing date. It would also require that a Constituent Bank tabulate the votes cast in a merger ratification vote immediately after the closing date. Again, these requirements are similar to those that apply to the election of member directors, as provided in § 1261.8(e) of the FHFA's regulations.[25] Paragraph (a)(3) would provide that a proposed merger will be considered to be ratified by a Bank's members if a majority of votes cast in the election have been cast in favor of the ratification of the merger agreement. Finally, paragraph (a)(3) would also require that the Constituent Banks (in the case of a rejected merger proposal), or Continuing Bank (in the case of a ratified merger proposal) retain all ballots for at least two years after the date of the election and would prohibit the Bank from disclosing how any member voted. This requirement is similar to that contained in § 1261.8(f)(5) of FHFA's regulations pertaining to the retention of ballots in the election of Bank directors.[26]

Paragraph (a)(4) would require that, within ten (10) calendar days of the closing date, a Constituent Bank deliver to its members, to each Constituent Bank with which it proposes to merge, and to FHFA a statement of: the total number of eligible votes; the number of members voting in the election; and the total number of votes cast both for and against ratification of the merger agreement, as well as those that were eligible to be cast by members that abstained and by members who failed to return completed ballots.

Paragraph (b) of proposed § 1278.6 would state that, in connection with a proposed merger, no Bank, or any director, officer, or employee thereof, shall make any statement, written or oral, which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statement not false or misleading, or necessary to correct any earlier statement that has become false or misleading.

Section 1278.7—Final Approval by Director:

Section 1278.7 of the proposed rule would govern the process by which the Director of FHFA would either grant or deny final approval of merger transactions.

Paragraph (a) of proposed § 1278.7 would provide that, upon ratification of a merger agreement by the members of the Constituent Banks, each Constituent Bank must provide to FHFA: A certified copy of the members' resolution ratifying the merger agreement; a certification of the member vote from the corporate secretary or from an independent third party; and any required evidence that any conditions imposed as part of the preliminary approval granted under § 1278.5 have been satisfied.

Paragraph (b) of proposed § 1278.7 would set forth the procedures for the Director's final determination to grant or deny approval of the merger transaction. The introductory portion would provide that, after FHFA has received all of the materials required to be provided under paragraph (a), the Director shall, within thirty (30) days, either grant or deny final approval of the merger.

Under paragraph (b)(1), if the Director grants final approval of the merger, FHFA would provide written notice of the approval to each Constituent Bank as well as to each Bank and the Office of Finance. The Constituent Banks then would file with FHFA an organization certificate for the Continuing Bank in the form approved by the Director as part of the preliminary approval process and executed by the individuals who will constitute the board of directors of the Continuing Bank. Upon the acceptance of the organization certificate by FHFA, the Continuing Bank would be a body corporate operating under the approved organization certificate, as of the Effective Date, with all powers granted to a Bank under the Bank Act. Paragraph (b)(1) would also provide that, with respect to mergers that meet the definition set forth in paragraph (1) or (2) of the definition of "merger" set forth in § 1278.1, the corporate existence of any Constituent Bank that is not a Continuing Bank would cease as of the Effective Date and the Continuing Bank would succeed to all rights, titles, powers, privileges, books, records, assets and liabilities of the Constituent Banks, as provided in the merger agreement.

Paragraph (b)(2) of proposed § 1278.7 would prohibit the Director of FHFA from denying final approval of a merger except pursuant to a determination that either: the member vote was not carried out in accordance with the requirements of § 1278.6; one or more Constituent Banks failed to fulfill a condition of the preliminary approval; or an event has occurred since the time of the preliminary approval that would have a significant adverse impact on the future viability of the Continuing Bank.

If the Director makes one of the required determinations and denies final approval of a merger, FHFA would be required to provide written notice of the denial to each Constituent Bank and to each other Bank and the Office of Finance. In addition, paragraph (b)(2) would require that FHFA provide to the Constituent Banks a written statement of the reasons for the denial, which reasons must be related to one of the determinations that the Director must make in order to deny final approval.

IV. Paperwork Reduction Act

The proposed rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

V. Regulatory Flexibility Act

The proposed rule applies only to the Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). *See* 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, FHFA certifies that this proposed rule, if promulgated as a final rule, will not have significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 1278

Banks, banking, Federal home loan banks, mergers.

For the reasons stated in the preamble, and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency proposes to amend subchapter D of chapter XII of title 12 of the Code of Federal Regulations by adding part 1278 to read as follows:

[25] *See* 12 CFR 1261.8(e).

[26] *See* 12 CFR 1261.8(f)(5).

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY SUBCHAPTER D—FEDERAL HOME LOAN BANKS

PART 1278—VOLUNTARY MERGERS OF FEDERAL HOME LOAN BANKS

Sec.
1278.1 Definitions.
1278.2 Authority.
1278.3 Merger agreement.
1278.4 Merger application.
1278.5 Preliminary approval by Director.
1278.6 Ratification by Bank members.
1278.7 Final approval by Director.

Authority: 12 U.S.C. 1432(a), 1446, and 4511.

§ 1278.1 Definitions.

As used in this part:

Bank, written in title case, means a Federal Home Loan Bank established under section 12 of the Bank Act (12 U.S.C. 1432).

Bank Act means the Federal Home Loan Bank Act, as amended (12 U.S.C. 1421 through 1449).

Constituent Bank means a Bank that is proposing to merge with one or more other Banks. Each Bank entering into a merger is a Constituent Bank, regardless of whether it is also a Continuing Bank.

Continuing Bank means a Bank that will exist as the result of a merger of one or more Constituent Banks, and when used in the singular shall include the plural.

Director, written in title case, means the Director of FHFA or his or her designee.

Disclosure Statement means a written document that contains all of the items that a Bank would be required to include in a Form S–4 Registration Statement Under the Securities Act of 1933 (or any successor form promulgated by the United States Securities and Exchange Commission governing disclosure required for securities issued in business combination transactions) when prepared as a prospectus as directed in Part I of the form, if the Banks were required to provide such a prospectus to their shareholders in connection with a merger.

Effective Date means the date on which the Constituent Banks consummate the merger, or, in the case of a merger encompassing two or more component transactions, the date on which the relevant Constituent Banks consummate each component transaction.

FHFA means the Federal Housing Finance Agency.

Merge or *Merger* means—

(1) A merger of one or more Banks into another Bank;

(2) A consolidation of two or more Banks resulting in a new Bank;

(3) A purchase of substantially all of the assets, and assumption of substantially all of the liabilities, of one or more Banks by another Bank or Banks; or

(4) Any other business combination of two or more Banks into one or more resulting Banks.

§ 1278.2 Authority.

Any two or more Banks may merge, provided:

(a) The Constituent Banks have agreed upon the terms of the proposed merger and the board of directors of each Constituent Bank has authorized the execution of a written merger agreement as provided under § 1278.3;

(b) The Constituent Banks have jointly filed a merger application with FHFA to obtain the approval of the Director, as provided under § 1278.4;

(c) The Director has granted preliminary approval of the merger as provided under § 1278.5;

(d) The members of each Constituent Bank have ratified the merger agreement as provided under § 1278.6; and

(e) The Director has granted final approval of the merger as provided under § 1278.7.

§ 1278.3 Merger agreement.

A merger of Banks under the authority of § 1278.2 shall require a written merger agreement that:

(a) Has been authorized by the affirmative vote of a majority of a quorum of the board of directors of each Constituent Bank at a meeting on the record and has been executed by authorized signing officers of each Constituent Bank; and

(b) Sets forth all material terms and conditions of the merger, including, without limitation, provisions addressing each of the following matters—

(1) The proposed Effective Date of the merger;

(2) The proposed organization certificate and by-laws of the Continuing Bank;

(3) The proposed capital structure plan for the Continuing Bank;

(4) The proposed size and structure of the board of directors for the Continuing Bank;

(5) The formula to be used to exchange the stock of the Constituent Banks for the stock of the Continuing Bank, and a provision prohibiting the issuance of fractional shares of stock;

(6) Any conditions that must be satisfied prior to the Effective Date of the proposed merger, which must include ratification by members of the Constituent Banks and approval by the Director;

(7) A statement of the representations or warranties, if any, made or to be made by any Constituent Bank, or its officers, directors, or employees;

(8) A description of the legal opinions or rulings, if any, that have been obtained or furnished by any party in connection with the proposed merger; and

(9) A statement that the board of directors of a Constituent Bank can terminate the merger agreement before the Effective Date upon a determination by the Constituent Bank, with the concurrence of FHFA, that:

(i) The information disclosed to members contained material errors or omissions;

(ii) Material misrepresentations were made to members regarding the impact of the merger;

(iii) Fraudulent activities were used to obtain members' approval; or

(iv) An event occurred between the time of the members' vote and the merger that would have a significant adverse impact on the future viability of the Continuing Bank.

§ 1278.4 Merger application.

(a) *Contents of application.* Any two or more Banks that wish to merge shall submit to FHFA a merger application that describes all material aspects of the proposed merger and that includes, at a minimum, the following:

(1) A written statement that includes—

(i) A summary of the material features of the proposed merger;

(ii) The reasons for the proposed merger;

(iii) The effect of the proposed merger on the Constituent Banks and their members;

(iv) The planned Effective Date of the merger;

(v) if the Constituent Banks contemplate that the proposed merger will be one of two or more related transactions, a summary of the material features of any related transactions and the bearing that the consummation of, or failure to consummate, the related transactions is expected to have upon the merger;

(vi) the names of the persons proposed to serve as directors and senior executive officers of the Continuing Bank;

(vii) A description of all proposed material operational changes including, but not limited to, reductions in the existing staffs of the Constituent Banks, whether and how Bank operations will be combined, and whether any Constituent Bank will continue to operate as a branch of the Continuing Bank;

(viii) Information demonstrating that the Continuing Bank will comply with all applicable capital requirements after the Effective Date;

(ix) A statement explaining all officer and director indemnification provisions; and

(x) An undertaking that the Constituent Banks will continue to disclose all material information, and update all items, as appropriate;

(2)(i) A copy of the executed merger agreement; and

(ii) A certified copy of the resolution of the board of directors of each Constituent Bank authorizing the merger agreement;

(3) A copy of the proposed organization certificate of the Continuing Bank;

(4) A copy of the proposed by-laws of the Continuing Bank;

(5) A copy of the proposed capital structure plan of the Continuing Bank;

(6) The most recent annual audited financial statements for each Constituent Bank; and

(7) Pro forma financial statements for the Continuing Bank in such form as would be required to be included in the Disclosure Statement.

(b) *Additional information.* FHFA may require the Constituent Banks to submit any additional information it deems necessary to evaluate the proposed merger. If FHFA has determined a merger application to be complete as provided in paragraph (c) of this section, FHFA may require the Constituent Banks to submit additional information only with respect to matters derived from or prompted by the materials already submitted, or matters of a material nature that were not reasonably apparent previously, including matters concealed by the Banks or relating to developments that arose after the determination of completeness. If the Constituent Banks fail to provide the additional information in a timely manner, FHFA may deem the failure to provide the required information as grounds to deny the application.

(c) *Completion of application.* Within thirty (30) days of the receipt of a merger application, FHFA shall determine whether the application is complete and whether FHFA has all information necessary for the Director to evaluate the proposed merger.

(1) If FHFA determines that the application is complete and that it has all information necessary to evaluate the proposed merger, it shall so inform the Constituent Banks in writing.

(2) If FHFA determines that the application is incomplete, or that it requires additional information in order to evaluate the application, it shall so inform the Constituent Banks in writing, and shall specify the number of days within which the Constituent Banks must provide any additional information or materials. Within fifteen (15) days of receipt of the additional information or materials, FHFA shall inform the Constituent Banks in writing whether the merger application is complete.

§ 1278.5 Preliminary approval by Director.

(a) *Standards.* In determining whether to approve a merger of any two or more Banks, the Director shall take into consideration the financial and managerial resources of the Constituent Banks, the future prospects of the Continuing Bank, and the effect of the proposed merger on the safety and soundness of the Continuing Bank and the Bank System.

(b) *Determination by Director.* After FHFA determines that a merger application is complete as provided in § 1278.4(c), the Director shall, within thirty (30) days, either grant or deny preliminary approval of the merger.

(1) If the Director grants preliminary approval of the merger, FHFA shall provide written notice of the approval to each Constituent Bank, as well as to each other Bank and the Office of Finance. The notice shall set forth any conditions that must be met prior to the final approval of the merger.

(2) If the Director denies preliminary approval of the merger:

(i) FHFA shall provide written notice of the denial to each Constituent Bank, as well as to each other Bank and the Office of Finance; and

(ii) The notice provided to the Constituent Banks shall include a statement of the reasons for the denial.

§ 1278.6 Ratification by Bank members.

(a) *Requirements for member vote.* No merger of two or more Banks may be consummated unless the merger agreement authorized by the boards of directors of the Constituent Banks has been ratified by the affirmative vote of the members of each Constituent Bank in a voting process that meets the following requirements:

(1) Each Constituent Bank shall submit the authorized merger agreement to its members for ratification by delivering to each of its members—

(i) A ballot that permits the member to vote for or against the ratification of the merger agreement, or to abstain from such vote; and

(ii) A Disclosure Statement that establishes a closing date for the Bank's receipt of completed ballots that is no earlier than thirty (30) days after the date that the ballot and Disclosure Statement are delivered to its members.

(2) In the vote to ratify the merger agreement, each member of each Constituent Bank shall be entitled to cast the same number of votes that the member may cast in that year's election of Bank directors, as set forth in § 1261.6 of this chapter. A member must cast all of its votes either for or against the ratification of the merger agreement, or may abstain with respect to all of its votes. Each member's vote shall be made by resolution of its governing body, either authorizing the specific vote, or delegating to an individual the authority to vote.

(3) No Constituent Bank shall review any ballot until after the closing date established in the Disclosure Statement and shall not include in the tabulation any ballot received after the closing date. A Constituent Bank shall tabulate the votes cast immediately after the closing date. The members of a Constituent Bank shall be considered to have ratified a merger agreement if a majority of votes cast in the election have been cast in favor of the ratification of the merger agreement. The Constituent Bank, or the Continuing Bank, as appropriate, shall retain all ballots received for at least two years after the date of the election, and shall not disclose how any member voted.

(4) Within ten (10) days of the closing date, a Constituent Bank shall deliver to its members, to each Constituent Bank with which it proposes to merge, and to FHFA a statement of—

(i) The total number of eligible votes;

(ii) The number of members voting in the election; and

(iii) The total number of votes cast both for and against ratification of the merger agreement, as well as those that were eligible to be cast by members that abstained and by members who failed to return completed ballots.

(b) *False and misleading statements.* In connection with a proposed merger, no Bank, nor any director, officer, or employee thereof, shall make any statement, written or oral, which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statement not false or misleading, or necessary to correct any earlier statement that has become false or misleading.

§ 1278.7 Final approval by Director.

(a) *Proof of member ratification.* Upon ratification of a merger agreement by the members of the Constituent Banks, the

Constituent Banks shall provide to FHFA:

(1) A certified copy of the members' resolution ratifying the merger agreement, on which the members cast their votes, from each Constituent Bank;

(2) A certification of the member vote from the corporate secretary of each Constituent Bank or from an independent third party;

(3) Any required evidence that any conditions imposed as part of the preliminary approval granted under § 1278.5 have been satisfied; and

(4) The Disclosure Statement for each Constituent Bank.

(b) *Final determination.* After FHFA has received all materials required to be provided under paragraph (a) of this section, the Director shall, within thirty (30) days, either grant or deny final approval of the merger.

(1) If the Director grants final approval of the merger:

(i) FHFA shall provide written notice of the approval to each Constituent Bank, as well as to each other Bank and the Office of Finance;

(ii) The Constituent Banks shall file with FHFA an organization certificate for the Continuing Bank, executed by the individuals who will constitute the board of directors of the Continuing Bank. Upon the acceptance of the organization certificate by FHFA, the Continuing Bank shall be a body corporate operating under the approved organization certificate, as of the Effective Date, with all powers granted to a Bank under the Bank Act; and

(iii) With respect to mergers that meet the definition set forth in paragraph (1) or (2) of the definition of "merger" in § 1278.1, the corporate existence of any Constituent Bank that is not a Continuing Bank shall cease as of the Effective Date and the Continuing Bank shall succeed to all rights, titles, powers, privileges, books, records, assets and liabilities of the Constituent Banks, as provided in the merger agreement.

(2)(i) If preliminary approval has been granted, the Director shall not deny final approval of a merger other than pursuant to a determination that—

(A) The member vote was not carried out in accordance with the requirements of § 1278.6;

(B) One or more Constituent Banks failed to fulfill a condition of the preliminary approval; or

(C) An event has occurred since the time of the preliminary approval that would have a significant adverse impact on the future viability of the Continuing Bank.

(ii) If the Director denies final approval of a merger:

(A) FHFA shall provide written notice of the denial to each Constituent Bank, as well as to each other Bank and the Office of Finance; and

(B) The notice provided to the Constituent Banks shall include a statement of the reasons for the denial.

Dated: November 19, 2010.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2010–29739 Filed 11–24–10; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management, Regulation and Enforcement

30 CFR Part 250

[Docket ID: BOEM–2010–0033]

RIN 1010–AD53

Production Measurement Documents Incorporated by Reference

AGENCY: Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

ACTION: Proposed rule.

SUMMARY: BOEMRE proposes to incorporate by reference 15 new production measurement industry standards into the regulations governing oil, gas, and sulphur operations in the Outer Continental Shelf. Incorporation of the production measurement standards provides industry with up-to-date guidance for measuring oil and gas production volumes. This will result in more efficient measurement of oil and gas production.

DATES: Submit comments by January 25, 2011. BOEMRE may not fully consider comments received after this date.

ADDRESSES: You may submit comments on the rulemaking by any of the following methods. Please use the Regulation Identifier Number (RIN) 1010–AD53 as an identifier in your message. *See also* Public Availability of Comments under Procedural Matters.

- *Federal eRulemaking Portal: http://www.regulations.gov.* In the entry titled "Enter Keyword or ID," enter docket ID BOEM–2010–0033 then click search. Under the tab "View By Docket Folder" you can submit public comments and view supporting and related materials available for this rulemaking. BOEMRE will post all comments.
- Mail or hand-carry comments to the Department of the Interior; Bureau of Ocean Energy Management, Regulation and Enforcement; Attention: Regulations and Standards Branch (RSB); 381 Elden Street, MS–4024, Herndon, Virginia 20170–4817. Please reference "Production Measurement Documents Incorporated by Reference, 1010–AD53" in your comments and include your name and return address.

Availability of Incorporated Documents for Public Viewing

When a copyrighted technical industry standard is incorporated by reference into our regulations, BOEMRE is obligated to observe and protect that copyright. BOEMRE provides members of the public with Web site addresses where these standards may be accessed for viewing—sometimes for free and sometimes for a fee. The decision to charge a fee is decided by standard developing organizations. The American Petroleum Institute (API) will provide free online public access to 160 key industry standards, including a broad range of technical standards once changes to the API Web site are complete. The standards represent almost one-third of all API standards and will include all that are safety-related or have been incorporated into Federal regulations, including the standards in this rule. The newly accessible standards will be available for review, and hardcopies and printable versions will continue to be available for purchase. We are proposing to incorporate both API and American Gas Association (AGA) standards, and the addresses to these Web site locations are:

API Standard/Document Contact IHS at 1–800–854–7179 or 303–397–7956 Local and International, *http://www.global.ihs.com* and; AGA Standard/Document 1–800–699–9277—Toll free in US & Canada *http://www.techstreet.com/contact.tmpl.*

For the convenience of the viewing public who may not wish to purchase or view these proposed documents online, they may be inspected at the Bureau of Ocean Energy Management, Regulation and Enforcement, 381 Elden Street, Room 3313, Herndon, Virginia 20170; phone: 703–787–1587; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

These documents, if incorporated in the final rule, will continue to be made available to the public for viewing when requested. Specific information on where these documents can be inspected or purchased can be found at